Supreme Court, U.S.
FILED

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98 459 JUL 13 1998

No.

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

WARREN W. WYNEKEN, Pro Se,
Petitioner,

v.

HARRY W. SCOTT, JOSEPH M. JOHNSON
and CHARLES E. WELLS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. Whether the Trial Court could properly bar the presentation of facts and argument in support of the complaint of Warren W. Wyneken under the following conditions:

When the court's ruling was made, it was phrased, "I am not going to let you retry that prior case." when the "prior case" had never been tried, when the issues it presented had not been challenged by any party and when the following conditions also applied:

(a.) When Wyneken's complaint was the first document filed in the lawsuit.

(b.) When such ruling was made after passage of 96 percent of the pre-trial portion of the lawsuit which then extended over four years.

(c.) When such ruling was made without stating any authority.

(d.) When, after the issuance of the contested ruling of the court, Wyneken submitted 13 issues constituting the body of his case which, on objection by four opposing counsel, were denied.

(e.) When such ruling was the first issue listed in the Statement of the Issues in Wyneken's brief to the Indiana Court of Appeals and was the first issue listed in Wyneken's brief for Petition to Transfer to the Supreme Court of Indiana.

2. Whether Harry W. Scott was the agent of Warren W. Wyneken in the prior litigation of *Cincinnati Insurance Company vs. Charles E. Wells*, when:

(a.) He served as Wyneken's assistant in reviewing the file, pleadings, motions, documents, and discovery records.

(b.) When he prepared for hearing, analyzed the file, drafted response for Wyneken and conferred re strategy, trial preparation and review of issues regarding Summary Judgment, Motion in Limine and Motion to Compel.

(c.) When Wyneken supplied Scott with an index of pleadings and discovery summaries.

(d.) When Wyneken rejected Scott's suggestions as to bifurcation of the trial and as to the relationship with opposing counsel and when Wyneken paid Scott $2,459.00 for 24.59 hours of service.

(e.) And when the trial court had ruled that Scott could not be Wyneken's agent and barred Wyneken from referring to Scott as his agent.

(f.) And when such relationship was the second issue raised in Wyneken's brief to the Court of Appeals and in the second issue raised in his brief to the Indiana Supreme Court.

PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

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CITATIONS OF OFFICIAL REPORTS OR OPINIONS AND ORDERS ENTERED IN THE CASE

1. 29 March 96. Ruling by Trial Judge Baker at Pre-Trial Conference stating the court would not allow Wyneken to retry prior case (*Cincinnati vs. Wells.*) Not in record. Repeated on numerous occasions later in court record. Not disputed.

2. 17 April 96. Trial Judge Baker grants Motion in Limine filed by Scott and Johnson and by Bleeke on behalf of Wells, blocking all reference by Wyneken to facts from case of *Cincinnati vs. Wells* (Record, Volume 1, pp. 96 to 103.) Record copy not signed, but not disputed.

3. 29 April 96. Wyneken files, "Issues in the Case of *Cincinnati vs. Wells...*" (Record, Volume 1, p. 135-137.) Ruling not in record. Not disputed.

4. 14 June 96. Trial Judge Baker entering second amended judgment based on jury verdict against Wyneken. (See Appendix A)

5. 15 August 97. Indiana Court of Appeals Memorandum Decision denying Wyneken's appeal. The court contended that Wyneken never pleaded agency. Appellate Court Memorandum Decision, p. 10. (See Appendix B)

6. 20 February 98. Supreme Court of Indiana order denying transfer without comment. (See Appendix C)

BASIS FOR JURISDICTION

The ruling of the Indiana Supreme Court denying transfer and confirming without comment the decision of the Indiana Court of Appeals was entered on February 12, 1998 (Appendix C). The Court of Appeals decision had been entered August 15, 1997 (Appendix B). The Supreme Court of the United States, by letters dated April 27, 1998, and May 29, 1998, extended the time to file the Petition for Writ of Certiorari to and including July 12, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C., §1257. This appeal is made pursuant to Amendment V of the Constitution of the United States, which provides in part, "No person shall be...deprived of...property without due process of law..."

CONCISE STATEMENT OF THE CASE

This appeal involves two lawsuits. The first was filed in 1987 by Cincinnati Insurance Company against Charles E. Wells contending negligence in the installation of a furnace in a house constructed by Moon. Wells was uninsured and consulted Wyneken, who concluded that the action was totally unjustified and even criminal since Cincinnati Insurance Company attorneys, after making a big demand of $175,000.00, would then agree to settle at a low figure and walk away with an easy fee, as they did with Wells' fully insured co-defendant, Berning, settling at seven percent of the demand.

After four years, passage through three courts and before four judges, the case came to trial in early 1992. Wells and his counsel, Wyneken, agreed - although Wells

claimed not to remember such - not to settle for less than $350,000.00 on Wells' counterclaim for abuse of civil process. Wyneken believed that the facts would allow a showing that Wells was uninsured, but the special trail judge ruled that this could not be done. Under the slight tension of the moment, Wyneken in his opening statement mistakenly stated to the jury that Wells was uninsured. Counsel for Cincinnati, as they had done on numerous occasions before, delayed the proceedings by asking for the declaration of a mistrial. A week later, after a great show of affection, Wells discharged Wyneken and a few days later hired Scott and Johnson, the former of which had been hired and worked with Wyneken over the prior two years.

Several months later Scott, then with Johnson, negotiated a settlement with Cincinnati, who took nothing for their prior demand of $176,000.00, and paid Wells on his counterclaim $9,000.00 with a fee to Scott and Johnson of $6,000.00.

Shortly thereafter, Wyneken brought suit against Scott, Johnson and Wells contending that Scott, with the assistance of Johnson, had violated his agency relationship with Wyneken; and against Wells contending that although Wells had every right to discharge Wyneken, he would be liable to him for a fee for which the prospects of recovery were extremely high and for which Wyneken had expended 1,500.4 hours on behalf of Wells. Counterclaims for abuse of civil process were brought by the defendants against Wyneken.

This case went to a jury trial almost four years later, but about three months before the trial, Special Judge Baker ruled that Wyneken could not retry the case of *Cincinnati vs. Wells*. This ruling is not in the record but is described in Wyneken's motion filed April 29, 1996, (Record, Volume 1,

pp. 135-137) and was not disputed by any party. The case had never been tried and the parties, both Plaintiff and Defendant, were different. Baker further ruled that there was no agency relationship between Wyneken and Scott and that Wyneken could not refer to Scott as having been his agent (Record, Volume 3, p. 601, ll. 1-11.) These rulings blocked the central issues that Wyneken hoped to press. After five days of trial, the jury rendered a verdict in favor of Defendants Scott, Johnson and Wells and against Wyneken, essentially affirming the claim of abuse of civil process with a judgment in the amount of $490,000.00, aggregating with interest to over $600,000.00 as determined by Judge Sheldon in May of 1998 and which was not dischargeable in bankruptcy.

The case was appealed to the Indiana Appellate Court which found against Wyneken and affirmed the verdict and rulings of the trial judge. These two issues, the blocking of facts of the case of *Cincinnati Insurance Company vs. Wells* and the barring of evidence of the agency relationship between Wyneken and Scott, were the first issues raised in Wyneken's appeal to the Indiana Appellate Court and thereafter in his Petition for Transfer to the Indiana Supreme Court. They are respectively set forth in Wyneken's Brief of Appellant, Indiana Court of Appeals, page 1 (top) and in his Brief in Support of Petition to Transfer to the Indiana Supreme Court, at page 1. The Court of Appeals affirmed the trial court noting that, "When the trial court excludes evidence, the proponent of the evidence must make an offer to prove in order to preserve the ruling for appellate review." (Appellate Court decision, p. 7, bottom of page.) Well over 135 questions would have been necessary to meet such requirement, and Wyneken did not see this as an evidentiary matter, but rather as the blocking of an entire cause of action.

The Supreme Court of Indiana denied Wyneken's Petition to Transfer, without comment, on February 12, 1998 (Appendix C).

REASONS FOR ALLOWANCE OF THE WRIT

The Writ of Certiorari should be granted on the primary ground that the trial court was without authority to deny Wyneken's presentation of evidence and argument on his complaint against Charles Wells and his attorneys, Harry W. Scott and Joseph M. Johnson. This for the reason that the special judge in the case, Norman E. Baker, besides lacking authority for the ruling, made such after the passage of 96 percent of the four-year, pre-trial history of the case. Wyneken's complaint, which had been the first document filed in the litigation (Record, Volume 1, p. 37-39), prompted no adverse response from any of his four opposing counsel, although one of them, Bleeke, had falsely contended that these opposing counsel "...addressed the trial court regarding that issue by way of a motion in limine..." (Bleeke brief to Court of Appeals, p. 7, ll. 9 and 10.) Wyneken's complaint, in the prior litigation in which he had represented Charles Wells, had never been tried. Following the ruling by the court in the present case, backed up by motions in limine, numerous successful objections were made (Record, Volume 1, p. 96-98; Volume 1, pp. 159-165; Volume 3, p. 567, l. 4; Volume 3, p. 614, ll. 1-4; Volume 3, p. 690; Volume 3, p. 701, l. 17; Volume 4, p. 929, l. 11.)

Raised as the first issue in Wyneken's appeal to the Indiana Court of Appeals which saw this as a matter of evidence rather than as an entire cause of action and held to be discretionary (Court of Appeals decision, August 15, 1997, p. 8, Appendix B), it further contended that the Appellate

Court could afford no relief for Wyneken since he had not made an offer to prove (Court of Appeals decision, p. 8., Appendix B) But since the trial court had barred the entire case and since Wyneken had, after the court's ruling, made a special effort including a list of 13 issues deemed essential to his case (Record, Volume 1, pp. 135-137) which would have likely required more than 135 individual questions in order to present his case, it is obvious that this could not be treated as an individual evidentiary matter. The following is applicable law: State ex rel. Lopez v. Killegrew, et al., Supreme Court of Indiana, 174 N.E. 808 at p. 809:

> A party has the legal right to bring his action in any court which has jurisdiction of the subject-matter and can obtain jurisdiction of the parties. Illinois Life Ins. Co. v. Prentiss (1917) 277 Ill. 383, 113 N.E. 554, cited in 15 C.J.S. 735. When a court has jurisdiction over a class of cases and one seeking relief invokes the jurisdiction of the court in the manner prescribed by law, the particular cause is, *ipso facto*, under the jurisdiction of the court and the court cannot refuse jurisdiction.

Atkins v. United States, 556 F.2d, 1028 at p. 1040:

> As judges of this court, we find ourselves in much the same position as the judges in Evans v. Gore, supra. We regret that it falls our lot to decide these cases, and we would much prefer that a resolution of the controversy not be our responsibility. Nevertheless we realize that the plaintiffs are entitled to have their cases heard and decided by the court of the United States, and under

> the law there is no other court to which they could go. Should we refuse to hear and decide their cases, the doors of the courts would be closed to them. This could amount to a denial of due process under the 14th amendment by the Constitution. See Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 789, 28 L.Ed.2d 113 (1971). It is a fundamental principle of our jurisprudence that access to the courts to secure and establish important rights should be made available to all citizens at all times. This is particularly true where the complaining parties are asserting claims under the Constitution, as in the instant case.

The issue raised as the second matter in Wyneken's appeal to the Indiana Court of Appeals and thereafter in his Petition to Transfer to the Indiana Supreme Court involved his complaint against Harry Scott, who had worked with Wyneken in the prior case and who now, in taking Wyneken's client as his own, denied the prior agency relationship with Wyneken. He contended that he knew very little of the prior case and was only hired to sit at the counsel table, assist in selection of the jury, advise on a few local matters and take the testimony from two minor witnesses (Record, Volume 4, p. 777, l. 20 to ll. 1-22 on p. 778; p. 778, ll. 14-22; p. 782, ll. 17-21 and p. 783, ll. 1-10.) Judge Baker had ruled that he did not see Scott as Wyneken's agent (Record, Volume 3, p. 601, l. 4,) commenting (outside of the record) that he, "did not see how one lawyer could be the agent of another."

Against Scott's contentions, Wyneken presented in evidence two of Scott's billings to Wyneken for over 24 hours of work with a charge of $2,400.00 listing in detail the specific functions that Scott, as agent, had provided. Only

two of Scott's five billings to Wyneken are available, dated April 9, 1990, and two for August of 1990 (Record, Volume 2, p. 357 and 358) which in summary include the following services: "review and analyze file; review and examination of pleadings and preparation of motion; participation Pre-Trial Conference; draft of Response to Summary Judgment; review of motions and arguments and Motion to Compel; review of pleadings and discovery record; examination of case; review of documents and motions; preparation for and participation in hearing and conference in preparation of trial, including review and scope of issues." Scott's testimony was markedly different from the services he had billed (Volume 4, p. 777, ll. 20-21 through Volume 4, p. 783, ll. 6-10.)

Scott's veracity should be considered in the light of his testimony in which he stated that he and Johnson did not agree to take Wells' case until February 20, 1992 (Record, p. 785, l. 22 through p. 788, l. 3.) Against this, Scott's billing to Wells, dated February 24, 1992, showed services commencing on behalf of Wells as of January 10, 1992, through February 22, 1992, of $4,816.20 (Reply Brief of Appellant Wyneken, pp. 27 and 28.) For Indiana law of agency, Leon v. Caterpiller Indus., Inc. 69 F.3rd 1326 (7th Cir. 1995, p. 133, citations omitted.)

> In 1942, the Supreme Court of Indiana adopted Section One of the Restatement of Agency which defines agency as 'the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.' 'Indiana...requires an agent to be under the control of the principal. [Its] courts have never wavered from this definition.' ('An agency

> relationship can exist only if the agent is subject to the principal's control with respect to the work details'); ('the keystone of the agency relationship is the principal's ability to define and control the agent's activities'). 'The elements of actual agency are: (1) manifestation of consent by the principal; (2) acquiescence by the agent; and (3) control exerted by the principal.'

As a matter not central to this appeal but set forth as another example of the false testimony with which Wyneken was confronted, Wells testified that after the mistrial was declared Wyneken came to the counsel table and said to Wells, "I thought I could say that." referring to Wyneken's unintended violation of a court ruling as to Wells being uninsured. This falsification is apparent from the fact that Wyneken placed in evidence his own tape recording which he had distributed to 15 witnesses, which included the phrase in reference to Wells' insurance, "Unfortunately, the judge has ruled that we may not put that fact in evidence." (Record, p. 933, ll. 6-7.)

Thus, the ruling of the Indiana Supreme Court in confirming the decision of the Indiana Court of Appeals in holding that the trial judge's ruling barring Wyneken from the presentation of evidence and argument on his complaint was a matter of discretion is in direct conflict with the ruling of the Supreme Court of Pennsylvania in Smith vs. Gallagher, 185 A.2d, 135 at pp. 146 and 147:

> It is a mistake to assume that judges have unlimited power to 'intercede in a highly specialized situation.' A judge's function is to adjudicate and not to intercede, his duty is to

pass upon questions presented to him in accordance with established procedure and not of his own volition and initiative to issue orders, edicts and decrees 'bottomed' on his own personal estimate of a 'highly specialized situation.

Respectfully submitted this 11th day of September, 1998.

/s/_____

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APPENDIX

APPENDIX A

CIRCUIT AND SUPERJOR COURTS
26TH JUDICIAL CIRCUIT
ADAMS COUNTY, INDIANA

WARREN W. WYNEKEN, Plaintiff	)	
	)	**No. 01C01-9206-CP**
v.	)	**-035**
	)	
HARRY W. SCOTT, JOSEPH M. JOHNSON, AND CHARLES E. WELLS, Defendants	)	**Second Amended Order or Judgment of the Court**

The Court now amends its**Amended Order or Judgment of the Court dated June 12, 1996** to read as follows:

Based upon the jury's verdicts, judgment is hereby entered for Defendant and CounterClaimant, Charles E. Wells and against Plaintiff and Counter-Defendant, Warren W. Wyneken, for compensatory damages in the amount of $90,000.00 and punitive damages in the amount of $250,000.00. Based upon the jury's verdicts, judgment is further entered for Defendants and Counter-Claimants, Harry W. Scott and Joseph M. Johnson, and against Plaintiff and Counter-Defendant, Warren W. Wyneken for compensatory damages in the amount of $45,000.00 and punitive damages

in the amount of $100.000.00. Costs assessed against Plaintiff and Counter-Defendant.

Dated this 14th day of June, 1996.

/s/_____
Norman E. Baker, Special Judge
Adams Circuit Court

I certify that the copy of the foregoing Second Amended Order carried the signature of the Hon. Norman E. Baker.

This representation is made under the penalties of perjury.

/s/_____
Warren W. Wyneken, #1395-02

APPENDIX B

NOT FOR PUBLICATION

ATTORNEY FOR APPELLANT:

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Fort Wayne, Indiana

ATTORNEY FOR APPELLEES,

HARRY W. SCOTT and JOSEPH M. JOHNSON:

JOSEPH M. JOHNSON Decatur, Indiana

ATTORNEY FOR APPELLEE, CHARLES E. WELLS:

RICHARD R. BLEEKE
Bleeke & Associates
Fort Wayne, Indiana

IN THE COURT OF APPEALS
OF INDIANA

WARREN W. WYNEKEN,	)	
Plaintiff-Appellant	)	
	)	**No. 01A01-9609**
v.	)	CV-559
	)	
HARRY W. SCOTT, JOSEPH M.	)	**Appeal from the**
JOHNSON, AND CHARLES E.	)	**Adams County**
WELLS,	)	**Circuit Court**
Appellees-Defendants.	)	

APPEAL FROM THE ADAMS CIRCUIT COURT
The Honorable Norman E. Baker, Special Judge
Cause No. 01 CO 1-9206-CP-35

August 15, 1997

MEMORANDUM DECISION
NOT FOR PUBLICATION FRIEDLANDER, Judge

THIS IS A MEMORANDUM DECISION. PURSUANT TO APPELLATE RULE 15, IT SHALL NOT BE REGARDED AS PRECEDENT NOR CITED BEFORE ANY COURT EXCEPT FOR THE PURPOSES OF ESTABLISHING THE DEFENSE OF RES JUDICATA, COLLATERAL ESTOPPEL OR THE LAW OF THE CASE.

This appeal arises out of a lawsuit initiated by attorney Warren W. Wyneken against his former client, Charles E. Wells, and against attorneys Harry W. Scott and Joseph M. Johnson. Wyneken brought suit against Wells for an alleged

breach of contract, and Wells counterclaimed, alleging legal negligence and abuse of process. Wyneken also brought suit against Scott and Johnson for alleged tortious interference with contractual relations, and Scott and Johnson counterclaimed, alleging abuse of process.

The matter was ultimately tried in two phases in the Adams Circuit Court. The first phase of the jury trial involved Wyneken's claims against Wells, Scott, and Johnson. After the jury rendered a verdict in favor of Wells, Scott and Johnson in the first phase of the trial, the second phase of the trial involved the counterclaims against Wyneken. The jury returned verdicts in favor of Wells, Scott, and Johnson in the second phase of the trial.

On June 14, 1996, the trial court entered a final judgment based upon the jury's verdicts. Costs were assessed against Wyneken, and Wyneken was ordered to pay Wells $90,000 in compensatory damages and $250,000 in punitive damages. The final judgment also ordered that Wyneken pay Scott and Johnson $45,000 in compensatory damages and $100,000 in punitive damages. Wyneken appealed to this court.[1]

The parties were involved in prior litigation which ultimately led to the filing of this lawsuit. In order to understand the issues raised by Wyneken in this appeal, it is necessary to briefly discuss the facts surrounding the prior litigation.

The Cincinnati Insurance Company paid a $175,000

---

[1] Oral argument was conducted before this court on July 8, 1997.

claim as a result of a fire at the home of Carl Larry Moon. Thereafter, as subrogee of Moon, the insurance company filed suit in December 1986 against Wells, a heating and cooling contractor who had installed a wood-burning furnace in Moon's home in 1981. The insurance company alleged that the fire at the Moon residence was a result of faulty installation of the furnace by Wells.

Wells, who was uninsured, hired Wyneken to defend him in the suit brought by the insurance company. On behalf of Wells, Wyneken filed a counterclaim against the insurance company, alleging abuse of process. Wyneken asserted that there was "ample evidence", Appellant's Brief at 4, that the fire was the result of Moon's misuse of the furnace and that there was "ample reason to believe that the Cincinnati claim was based on a fictitious fire investigation since Cincinnati settled with the general contractor, Bob Berning, for 7% of the claimed loss [of $175,000] even though Beming was fully insured." Appellant's Brief at 11. Wyneken also claimed that

> he knew that the entire case as filed by the Cincinnati Insurance Company was without legal basis and that the then attorney representing Cincinnati, Mark Baeverstad, having knowingly procured a false fire report from Cincinnati's fire investigator, had filed the suit in an attempt to fraudulently procure a settlement with Well's believed insurance company.

Appellant's Brief at 16-17.

Wyneken hired attorney Harry Scott to assist him as local counsel at trial because trial was to be held in the county where Scott practiced. After many delays, the trial in the

Cincinnati v. Wells matter was scheduled for January 6, 1992. Wyneken intended to argue the issue of insurance coverage at trial, but the judge ruled that he could not do so. Nonetheless, during the course of his opening statement, Wyneken told the jury that Wells had come to see him because Wells did not have insurance at the time of the fire. Counsel for the insurance company successfully moved for a mistrial.

Wells, who was upset with Wyneken after the mistrial was declared, called Scott at home the evening of January 6, 1992. Scott suggested that Wells calm down, think it over, and discuss the matter with Wyneken. Four days later, Wells discharged Wyneken. Wells asked Scott to assist him in finishing the Cincinnati v. Wells litigation, and Scott asked his partner, Joseph Johnson, to review the files. Scott and Johnson ultimately agreed to represent Wells. The insurance company eventually dropped its subrogation claim against Wells and paid him $9,000.

Wyneken thereafter filed this lawsuit against Wells, Scott, and Johnson. Wyneken alleged in his complaint that Wells, in concert with Scott and Johnson, wrongfully terminated his contract with Wyneken for legal services. Wyneken also alleged in his complaint that Scott and Johnson wrongfully interfered with the contractual relationship between himself and Wells, but did not allege the existence of an agency relationship between himself and Scott or that Scott violated any duties associated with any such agency relationship.

During pretrial proceedings On March 29, 1996, the trial court ruled that it would not allow Wyneken to retry the Cincinnati v. Wells case in this matter. Believing that the Cincinnati v. Wells case involved issues essential to this case,

Wyneken thereafter sought an order that would allow him to present as evidence in this case a substantial amount of evidence from the Cincinnati v. Wells case. In his motion before the court, Wyneken stated in pertinent part:

> The Cincinnati v. Wells case was interrupted by a finding of a mistrial and immediately reset for trial in August of 1992. Wyneken has alleged that although Wells had a legal right to discharge him, irrespective of the reason, Wells'[s] counterclaim of abuse of civil process was so strong as to virtually assure Wells of a favorable verdict. Further, that Harry W. Scott owed Wyneken a duty as his agent, to help restore the relationship Wyneken had with Wells. Properly handled by Scott, the prior case had a great likelihood of resumption with ultimate success for Wells.

Record at 83-84. Wyneken also argued that (1) he had explicitly set forth his position in this case in his statement of claims and contentions, which had been filed with the court more than a year before and which had been included in at least one pretrial order supplied to all counsel, (2) defendants recognized the validity of his position and the relevance of such evidence and had not previously objected to the inclusion of the prior litigation in this case. Wells, Scott, and Johnson filed motions in limine, requesting that the court deny Wyneken's motion. The ultimate ruling on this issue is unclear from the record provided to this court, but it is apparent that the court excluded from trial a substantial amount of evidence from the Cincinnati v. Wells case.

The trial court also excluded testimony of three witnesses Wyneken sought to present in order to provide

evidence of his competency as a trial lawyer. Wyneken deposed Judge Robert Anderson, who had presided over the Cincinnati v. Wells case for a number of years before being replaced by a special judge prior to trial, and sought to introduce Judge Anderson's testimony at trial. Wells objected, and the trial court ruled that Wyneken could not present Judge Anderson's testimony at trial. Wyneken did not offer Judge Anderson's testimony at trial, made no offer of proof with regard to substance of Judge Anderson's testimony, and did not provide this court with a copy of Judge Anderson's deposition as part of the appellate record.

Matt Kolb and Joseph Christoff testified at trial on behalf of Wyneken. When Wyneken asked Christoffto state his opinion of Wyneken's professionalism and competence as an attorney, counsel for Wells, Scott, and Johnson objected on the basis of Ind. Evidence Rule 404, which provides that evidence of a person's character or trait of character is generally not admissible for the purpose of proving action in conformity therewith on a particular occasion. The trial court sustained the objection and precluded Christoff from testifying with regard to Wyneken's competency as a trial attorney. Wyneken thereafter made the following offer of proof with regard to Christoffs testimony:

> [T]he plaintiff would offer to prove the following facts, that the witness, Joseph Christoffwhen asked as to the litigation and trial skills of the plaintiff, Warren Wyneken that he would answer in the affirmative state that they were of a high quality that he was an able practitioner that he was well experienced and that he had conducted numerous examples of that in the presence of the witness.

Record at 646.

Kolb testified at thai that he and Wyneken worked together on a federal case in the early- to mid-seventies, and, largely through Wyneken's efforts, obtained a substantial judgment. According to Kolb, there was a complex issue in that case regarding federal jurisdiction, and the judgment was eventually reversed on appeal. Counsel for Wells, Scott, and Johnson objected when Wyneken asked Kolb to state his opinion of Wyneken's abilities as a trial lawyer. The trial court sustained the objections based upon Evid. R. 404. Wyneken made no offer of proof with regard to Kolb's testimony.

After the jury returned verdicts in favor of Wells, Scott, and Johnson in both phases of the trial and judgment was entered upon the verdicts, Wyneken initiated this appeal. He raises the following restated issues on appeal:

> 1. Did the trial court err in refusing to allow Wyneken to present at trial evidence from the Cincinnati v. Wells matter?
>
> 2. Did the trial court err in determining that Scott was not Wyneken's agent, ordermg that Wyneken could not refer to Scott as his agent during trial, and limiting the evidence that Wyneken could offer in support of the alleged agency relationship?
>
> 3. Did the trial court err in refusing to allow Wyneken to present evidence of his general competence as a trial attorney to show that he acted competently in representing Wells in the Cincinnati v. Wells action?

We affirm.

Wyneken claims that the trial court erred in refusing to allow him to present at trial evidence from the Cincinnati v. Wells matter.

When the trial court excludes evidence, the proponent of the evidence must make an **offer** of proof in order to preserve the ruling for appellate review. Paullus v. Yarnelle, 633 N.E.2d 304 (Ind. Ct. App. 1994), trans. denied. An offer of proof allows the appellate court to consider the propriety of the trial court's decision to exclude the evidence and thus must demonstrate the substance, purpose, relevancy, and materiality of the excluded evidence.

Id.

Wyneken made no offer of proof at trial regarding the evidence from the Cincinnati v. Wells case that he wanted to present. Accordingly, he has waived this issue for appellate review. Paullus, 633 N.E.2d 304.

Wyneken states in pertinent part in his appellate brief:

> More than three quarters through the pre-trial proceedings, special Judge Norman Baker announced that he was "not going to re-try the prior case." . . . Wyneken responded with a special motion to restore the prior case as an essential element in the present case. . . . This was overruled and accompanied by a Motion in Limine by the then Defendants barring reference to the prior case.

> As a second effort, Wyneken listed 13 facts of the prior case that he should be allowed to make reference to .... Except for two such issues, this was denied and in the ultimate trial of this case, the Judge's ruling and the Defendants' Motion in Limine were raised to block the evidence that Wyneken attempted to submit.

Appellant's Brief at 6-7. Wyneken does not state, and we cannot readily discern from the limited record provided to this court on appeal, exactly what evidence Wyneken sought to have admitted, what evidence was excluded and why, and what two issues were allowed into evidence at trial.

The admission or exclusion of evidence is a matter which is entrusted to the sound discretion of the trial court. Paullus, 633 N.E.2d 304. Because we do not know what evidence Wyneken wished to present at trial or the purpose for such evidence, we are unable to discern the relevance and materiality of the evidence. While some aspects of the Cincinnati v. Wells case might have been at least marginally germane to the claims and counterclaims that were presented in this case, we are unable to conclude on such a limited record that the trial court's exclusion of evidence from the Cincinnati v. Wells case constituted an abuse of discretion.

2.

Wyneken claims that the thai court erred in determining that Scott was not Wyneken's agent, ordering that Wyneken could not refer to Scott as his agent during trial, and limiting the evidence that Wyneken could offer in support of

the alleged agency relationship.

Assuming without deciding that the thal court erred in determining that Scott was not Wyneken's agent, such error was harmless because the existence of an agency relationship is not an element of either claim advanced by Wyneken.

There is no question that Wyneken did not plead the existence of an agency relationship in his complaint and never sought to amend his complaint in order to so plead. Nonetheless, he claimed at oral argument that he raised the issue of agency in his statement of claims and contentions filed with the court more than a year before trial. We are unable to determine whether Wyneken actually raised the issue of agency in his statement of claims and contentions because that document is not included in the record provided on appeal. Assuming for the sake of argument that Wyneken did raise this issue in his statement of claims and contentions, such is not a pleading. See Ind. Trial Rule 7(A). Although T.R. 15(B) provides that, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings", the issue whether an alleged agency relationship existed between Wyneken and Scott was not tried by express or implied consent of the parties here. In fact, objection was made before trial on the ground that Wyneken had never pleaded an agency theory. In addition, Wyneken cannot properly claim that the issue of agency was before the court on the basis of contentions contained within the pretrial order because the record in this case contains only a proposed pretrial order and not one signed by the court.

Because Wyneken never pleaded the existence of an agency relationship and a breach thereof and because the issue of agency was not tried by express or implied consent of the

parties, evidence of such an agency relationship would have been irrelevant and therefore inadmissible. See Evid. R. 402. Accordingly, the trial court did not err in ordering that Wyneken could not refer to Scott as his agent during trial and limiting the evidence that Wyneken could offer in support of the alleged agency relationship.

3.

Wyneken claims that the trial court erred in refusing to allow him to present testimony at trial of Judge Anderson, Kolb, and Christoff regarding his general competence as a trial attorney.

By failing to make an offer of proof at trial regarding Judge Anderson's deposition testimony and Kolb's trial testimony, Wyneken waived review of this issue. White v. White, 655 N.E.2d 523 (Ind. Ct. App. 1995); Paullus, 633 N.E.2d 304. Even if this issue were not waived, it is without merit. First, this court has held that policy concerns demand that the judge hearing an underlying action not testify in a subsequent legal malpractice action. Comett v. Johnson, 571 N.E.2d 572 (Ind. Ct. App. 1991). Second, Wyneken's purpose for seeking to present the excluded testimonies of Kolb, Christoff, and Judge Anderson was to present evidence of his own competency as a trial lawyer in order to show that he acted competently in representing Wells in the Wells v. Cincinnati case. This is an impermissible purpose pursuant to Evid. R. 404. Accordingly, the trial court did not err in excluding evidence regarding Wyneken's general competence as a trial attorney.

Judgment affirmed.

SULLIVAN, J., and KIRSCH, J., concur.

THIS IS A MEMORANDUM DECISION. PURSUANT TO APPELLATE RULE 15, IT SHALL NOT BE REGARDED AS PRECEDENT NOR CITED BEFORE ANY COURT EXCEPT FOR THE PURPOSES OF ESTABLISHING THE DEFENSE OF RES JUDICATA, COLLATERAL ESTOPPEL OR THE LAW OF THE CASE.

APPENDIX C

STATE OF INDIANA

H. John Okeson
Clerk of the Supreme Court
Court of Appeals and Tax Court
(317) 232-1930
fax (317) 232-8365

Cause Number:
01A02-9609-CV-00559
Lower Court Number:
01CO19206CP35

WARREN WYNEKEN
110 West Berry Street
Suite 1717
Fort Wayne, IN 46802

WYNEKEN, WARREN W. -V- SCOTT, HARRY W., ET. AL,

THIS MATTER COMES BEFORE THE INDIANA SUPRME COURT ON A PETITION TO TRANSFER FROM A DECISION FO THE COURT OF APPEALS, PURSUANT TO INDIANA APPELLATE RULE 11(B). THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS, THE RECORD OF PROCEEDINGS, THE BRIEFS WHICH WERE FILED IN THE COURT OF APPEALS, AND THE MATERIALS

WHICH WERE SUBMITTED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH MEMBER OF THE COURT HAS VOTED ON THE CASE. EACH MEMBER OF THE COURT HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICES VIEWS ON THE APPEAL IN CONVERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER.

RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR

Witness my name and the seal of said Court,
12th day of February, 1998.

/s/_____
H. John Okerson